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# NINE MONTHS OF WORKMEN'S COMPENSATION IN NORTH CAROLINA\*

ALLEN K. SMITH\*\*

A survey of the judicial operation of the North Carolina Industrial Commission during the first nine months of its existence sheds light on the future of Workmen's Compensation in North Carolina. Operating under an act, which in the rush of legislation was inexpertly drafted as a compromise bill, the Industrial Commission has functioned smoothly and has assumed that liberal viewpoint necessary to the effective discharge of its duties. It is to be hoped that subsequent legislatures will cure the statutory defects and that the appellate tribunals will not tie the hands of the Commission. Certainly, if such aid is given, the Commission has laid the foundation for a constructive future.

## *Accident Arising Out of and in the Course of Employment*

As defined by §2 (f) an "injury" for which compensation is allowed "shall mean only injury by accident arising out of and in the course of the employment. . . ." This definition presents a double aspect. "In the course of" refers to the time, place and circumstances under which the accident occurred. This is, in most cases, a fairly simple question.<sup>1</sup> The real difficulty arises in determining

\* All references to "Act," "Compensation Act" and "Workmen's Compensation Act" are to N. C. Pub. Laws (1929) ch. 120; and all references to sections are to the sections under this statute.

\*\* Student Editor-in-chief, NORTH CAROLINA LAW REVIEW, 1929-30.

<sup>1</sup> Injuries caused by a worker stepping aside from his work to engage in something personal do not arise in the course of employment. *Piercy v. Henrietta Mills*, 1 N. C. I. C. 314 (1930) (spinner on night shift voluntarily left his work to eat lunch and was injured on his return trip); *Smith v. Neuse Veneer & Box Co.*, 1 N. C. I. C. 317 (1930) (*A*, employed to feed a dry kiln, injured by a buzz saw while cutting a board for a window light at his home).

Perplexing cases do sometimes arise on the question of "arising out of the employment." *Bradley v. Ozaer Mills*, 1 N. C. I. C. 298 (1930) (employer encouraged doffer boys to leave building during idle periods; plaintiff injured by falling from an outside platform during an idle period, compensation allowed). Another perplexing case: *A*, prior to reporting for work, assisted in taking home a person who had fainted. Upon returning to the factory and thinking that he was late for work, *A* ran up the stairs leading to the fifth floor, stumbled on the stairway on the third floor and was injured. Compensation was allowed. *Jones v. R. J. Reynolds Tobacco Co.*, 1 N. C. I. C. 17 (1929). For collections of cases on this subject see the following: Note (1920) 6 A. L. R. 1151 (injuries during lunch hour); Note (1923) 24 A. L. R. 1233 (injuries while riding to and from work in the employer's conveyance); Note (1927) 49 A. L. R. 424 (injuries while entering or leaving the place of employment).

whether the accident is one "arising out of the employment." That this is considered as a mixed question of law and fact makes the problem all the more difficult.<sup>2</sup> In the final analysis it means that there must be apparent "to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury."<sup>3</sup> For instance, an injury occasioned by an assault of a co-employee and growing out of differences in regard to the employment was held to be within the definition.<sup>4</sup> But where the assault grew out of personal malice unconnected with the employment, no compensation was awarded.<sup>5</sup> In the further case of an unprovoked assault by a third person upon an employee, the risk having arisen out of the employment, a recovery was allowed.<sup>6</sup> Moreover, if the injury occurs from a prank played by a fellow workman, compen-

It is interesting to note that a common law remedy was suggested by Commissioner Allen in both the Piercy and Smith cases, *supra*. He suggested that "if the master has failed in its duty to explain the hazards and dangers connected with the business, and failed to take ordinary care to protect him from risks, which he [a minor in both cases] could not appreciate, the master is subject to the same liability as if the child were not a servant or employee, and the claimant may have a remedy at common law based upon a duty to him as a licensee." It would seem that under §§10 and 11 of the North Carolina Act the common law remedy would be abrogated. Moreover, it appears from the last sentence in the first paragraph of §11 and also from §2(b) that even when unlawfully employed the minor shall recover compensation "the same and to the same extent as if said employee was an adult." By the prior provision of §11 this remedy would seem to be exclusive. But this is not the usual view. Note (1921) 14 A. L. R. 818; Note (1924) 33 A. L. R. 337; Note (1927) 49 A. L. R. 1435; Note (1929) 60 A. L. R. 847.

<sup>2</sup> *Conrad v. Cook-Lewis Foundry Co.*, 1 N. C. I. C. 20 (1929).

<sup>3</sup> *Re Annie McNicol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A. 306, 307 (1913), in which it is further stated: "The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have followed from that source as a rational consequence."

<sup>4</sup> *Conrad v. Cook-Lewis Foundry Co.*, *supra* note 2; *Anner v. Johnson Rayon Mills, Inc.*, 1 N. C. I. C. 245 (1930); Note (1921) 15 A. L. R. 588, 590. For injuries growing out of labor trouble see Notes (1921) 13 A. L. R. 549 and (1924) 31 A. L. R. 1085.

<sup>5</sup> *Harden v. Thomasville Furniture Co.*, 1 N. C. I. C. 131 (1929), *aff'd* by Full Commission in 1 N. C. I. C. 217 (1930). This accords with the majority view. Note (1921) 15 A. L. R. 588, 594.

<sup>6</sup> *McDade v. Raleigh-Hopewell Ice & Coal Co.*, 1 N. C. I. C. 73 (1929) (the assailant worked for a customer of the defendant Ice Co.); Note (1921) 15 A. L. R. 588, 595. But see Note (1924) 29 A. L. R. 437, 445.

sation is given.<sup>7</sup> But if the injured employee engaged in the play, no recovery is permitted.<sup>8</sup>

Whether the injury arose "out of" the employment was vividly presented in the following case. *A*, a nightwatchman, while making his rounds, saw a car drive into his employer's canal, which was the source of water supply. *A* notified the shop foreman, made some more rounds, and finally entered the water, was caught by the current and drowned. There was testimony that *A* knew that if the car was not removed, it would interfere with the running of the mill. In the absence of evidence that *A*'s sole purpose was one of rescue, it was held, despite *A*'s use of bad judgment, that compensation should be allowed since a night watchman is primarily charged with preserving the employer's property.<sup>9</sup>

In the following case the servant's deviation from the strict course of employment was considered slight and it was held that he was still executing his master's business. *A*, a delivery boy, was supposed to stay on the job continually and to get his meals at the store. He was called to make a trip by motorcycle that carried him close to his home at the dinner hour. While on the trip he went by his home and ate dinner. On returning to business by the most direct route he suffered an accident, resulting in death.<sup>10</sup> This case seems to be in accord with the view heretofore expressed by the Supreme Court of North Carolina<sup>11</sup> and other appellate tribunals.<sup>12</sup>

In *Ballard v. Cannon Mills Co.*<sup>13</sup> the question was raised for the first time whether or not compensation could be allowed for the acceleration and aggravation by an injury of a preëxisting disease. Plaintiff was suffering from syphilis prior to the injury. The injury

<sup>7</sup> *Chambers v. Union Oil Co.*, 1 N. C. I. C. 221 (1930).

<sup>8</sup> *Starnes v. Flint Mfg. Co.*, 1 N. C. I. C. 239 (1930); Note (1921) 13 A. L. R. 540; Note (1922) 20 A. L. R. 882; Note (1925) 36 A. L. R. 1469; Note (1926) 43 A. L. R. 492; Note (1927) 46 A. L. R. 1150.

<sup>9</sup> *Southern v. Morehead Cotton Mills Co.*, 1 N. C. I. C. 65 (1929), aff'd. by Full Commission in 1 N. C. I. C. 200 (1930). For a general treatment of injuries sustained by night watchmen, see Notes (1920) 6 A. L. R. 578 and (1921) 13 A. L. R. 512.

<sup>10</sup> *Peppers v. Wiggins Drug Stores, Inc.*, 1 N. C. I. C. 164 (1929).

<sup>11</sup> *Duncan v. Overton*, 182 N. C. 80, 108 S. E. 387 (1921).

<sup>12</sup> *Ritchie v. Waller*, 63 Conn. 155, 27 L. R. A. 161 (1893) and note.

<sup>13</sup> *Ballard v. Cannon Cotton Mills*, 1 N. C. I. C. 107, 112 (1929), in which the Commissioner stated: "The Workmen's Compensation Act, the Courts of other jurisdictions time and again have stated, must be construed liberally, and this is always in the mind of the Commissioner in arriving at a decision in a claim for compensation." The case was affirmed by the Full Commission in, 1 N. C. I. C. 215 (1930).

was slight, having been caused by a box being pushed against the plaintiff's ankle. The testimony of the doctor was that the injury was the exciting cause of the disability, that the accident inflamed into activity, aggravated and accelerated the disease. The Commission allowed compensation.<sup>14</sup> In doing so it recognized that decisions in other states were not harmonious, but professed to follow the weight of authority in England<sup>15</sup> and in this country.<sup>16</sup> As a social matter the instant holding finds support.

*Disease Resulting Naturally and Unavoidably from the Accident*

The definition of injury given in §2 (f) also provides that it "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." In applying this to the following case the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea ophthalmia showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other eye. Compensation was allowed.<sup>17</sup> The Commission said that the disease was "natural" because one infection opened the way for other infections. There was more trouble with the word "unavoidably." The Commission quotes from the opinions rendered in other jurisdictions to illustrate that "unavoidably" does not mean "absolutely inescapable,"<sup>18</sup> but that "a thing is generally considered unavoidable when common prudence and foresight cannot prevent it."<sup>19</sup> And since no evidence was presented that the plaintiff had been careless, and since the plaintiff had no reason to suspect a possible

<sup>14</sup> "In this class of cases, where compensation is claimed on the ground that a preëxisting disease has been aggravated by injury resulting from an accident arising out of and in the course of the employment, to justify an award the evidence must be clear and satisfactory, both as to the facts of the accident and also in relation to the scientific or medical question of aggravation of the preëxisting disease or infirmity." *Logan v. Elliott Building Co.*, 1 N. C. I. C. 90, 92 (1929). This seems to be the generally adopted view. Note (1922) 19 A. L. R. 95; Note (1924) 28 A. L. R. 204.

<sup>15</sup> *Willoughby v. Great Western Ry. Co.*, 117 L. T. 132 (1904) (locomotor ataxia).

<sup>16</sup> Excellent Note (1929) 60 A. L. R. 1300, 1310.

<sup>17</sup> *Williams v. Thompson*, 1 N. C. I. C. 124 (1929).

<sup>18</sup> In re *MacLauchlan*, 9 F. (2d) 534, 535 (C. C. A. 2nd, 1925).

<sup>19</sup> *U. S. Casualty Co. v. Smith*, 34 Ga. App. 363, 129 S. E. 880, 885 (1925).

infection of this nature, the disease was found to have resulted unavoidably from the accident. This liberal construction tends to effectuate the general purpose of the Workmen's Compensation Act.<sup>20</sup>

*Independent Contractor, Subcontractor, Casual Employee, Employee Under Concurrent Contracts*

The Workmen's Compensation Act did not abrogate the doctrine of the independent contractor. "One who contracts to do a specific work, hires and controls his assistants, and executes the work entirely in accordance with his own ideas, or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in respect to details of the work, is not a servant or employee, but is an independent contractor, and not subject to the Workmen's Compensation Act."<sup>21</sup> This pronouncement of the Commission is in accord with the view of the North Carolina Supreme Court.<sup>22</sup> Somewhat of a limitation is placed upon this doctrine by §19 of the act in respect to subcontractors. This section provides that a principal contractor, immediate contractor or subcontractor who sublets a contract without securing a certificate that the subcontractor has insured his liability in the prescribed manner, is liable to the same extent as the subcontractor. This section further provides that in any action thereunder the award "shall fix the order in which said parties shall be exhausted [*sic*], beginning with the immediate employer." An award in such a situation made the immediate employer liable in first order, the insurance carrier of the principal contractor liable in second order, and the principal contractor liable in third order, each with full liability.<sup>23</sup>

Employment is not casual because intermittent. The Commission has said: ". . . we must conclude that the legislature did not con-

<sup>20</sup> Compensation is usually held to be allowable where there is a subsequent incident or injury if its consequences are the natural result of the original injury. Note (1920) 7 A. L. R. 1186.

<sup>21</sup> *Williams v. Kitchen Lumber Co.*, 1 N. C. I. C. 209, 211 (1930). (Plaintiff was paid by piecework for cutting cross ties; he employed others to assist him, the defendant exercising no supervision over the work; held, plaintiff was an independent contractor). Where the pieceworker is subject to the control of the employer, the pieceworker is considered an employee rather than an independent contractor. Note (1925) 38 A. L. R. 839.

For an exhaustive consideration of the cases showing the circumstances under which the relationship of employer and independent contractor is predictable see, Note (1922) 19 A. L. R. 1168-1361.

<sup>22</sup> *Midgett v. Banning Mfg. Co.*, 150 N. C. 333, 340, 64 S. E. 5 (1909); *Craft v. Albemarle Timber Co.*, 132 N. C. 152, 158, 43 S. E. 597 (1903).

<sup>23</sup> *Grant v. Allen*, 1 N. C. I. C. 15 (1929). On the general subject of provisions for employees of subcontractors see, Note (1929) 58 A. L. R. 872.

template an employment to be continuous in order to bring it within the Act, as they certainly would not enact a statute with such requirements that common knowledge would show to be a nullity under such construction."<sup>24</sup> Employment that is definite, whether for a day or for a year, is not casual.<sup>25</sup>

The Act does not expressly recognize the right of an employee under concurrent contracts with two or more employers to recover from the employer liable on the basis of the entire amount of wages earned.<sup>26</sup> It was held that in the absence of an express recognition of such a right, the loss of wages "must be measured by the impairment of his earning in the employment in which he was working at the time of the accident."<sup>27</sup> The Commission recognizes that this rule works a handicap in some cases, but denies itself the privilege, when the claimant was regularly employed at an ascertained wage, of abandoning the rule and exercising the discretion contained in §2 (e) to determine the amount "the injured employee would be earning were it not for the injury."<sup>28</sup>

### *Partial Disability But No Impairment of Earning Power*

The question has been raised whether or not the loss of a member, for which there is no specific provision, is compensable in the absence of proof of loss of earning power. It was answered in the negative.<sup>29</sup> There seems to be no doubt but that the theory of compensation is

<sup>24</sup> *Aycock v. Cooper*, 1 N. C. I. C. 290, 292 (1930).

<sup>25</sup> *Johnson v. Asheville Hosiery Co.*, 1 N. C. I. C. 41 (1929). By §14(b) and §2(b) the act does not apply to casual employees. But in §2(e) it is provided that where because of the short duration of the employment or *casual nature or terms* of the employment it is impractical to compute the average weekly wage a different mode of reckoning may be used. Yet this seeming conflict appears not to have been brought to the Commission's attention.

<sup>26</sup> Provision is made in §50 for compensation when the employee "shall at the time of the injury be in joint service of two or more employers subject to this act, such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employee."

<sup>27</sup> *Mills v. Transylvania Tanning Co.*, 1 N. C. I. C. 189 (1929).

<sup>28</sup> This particular portion of §2(e) reads as follows: "But where for exceptional reasons the foregoing [average weekly wage] would be unfair, either to the employer or to the employee, such other methods of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

An award based on the full salary was allowed, however, where the injured person was jointly employed by two school boards. *Parsons v. Boards of Education of Ashe and Watauga counties*, 1 N. C. I. C. 264 (1930).

<sup>29</sup> *Porter v. Jennings Cotton Mills*, 1 N. C. I. C. 218 (1930) (loss of a testicle, no impairment of physical and sexual power). Nor would there seem to be a disfigurement in the sense that word is used by the Commission. *Heninger v. The North Carolina Industrial Commission*, 1 N. C. I. C. 3 (1929).

based upon the impairment of the capacity to earn a livelihood.<sup>30</sup> The instant case, however, presents a rather exceptional situation. And in fact some courts have allowed a recovery upon the theory that loss of earning power is not the criterion of a disability partial in character and permanent in quality.<sup>31</sup> In the instant case the Commission states that some jurisdictions seem to hold that in such a case the Act is not exclusive and the claimant may have recourse to a common law action. No authority is cited in support of this suggestion and such a view is contrary to the spirit of compensation laws.

### *Settlement With a Third Party*

By the language of §11 of the Act "either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy." It would seem that by inadvertence no provision was inserted to bar the employee in the event he made a *settlement* with a third party-tort-feasor. (Another defect of a minor nature in this section has been pointed out before.)<sup>32</sup> That the Commission has construed the Act to include a settlement<sup>33</sup> is rather a tribute to its liberal policy, for under a strict interpretation a double recovery by the injured employee would be possible. An interesting case<sup>34</sup> of almost double recovery was presented to the Commission and it deemed itself unable to remedy the situation. A deputy sheriff, while searching for a still, was shot from ambush and wounded in the leg. The ambushers were indicted, brought to trial, and a suspended judgment rendered. The judgment of the criminal court, dated July, 1929, recited that the sum of \$2,000.00 was paid in the presence of the court to the plaintiff (meaning the prosecuting witness) by the ambushers. In August, 1929, the deputy sheriff and the county entered into an agreement for compensation. Pursuant thereto the insurance carrier paid \$414 for compensation and \$526.75 for medical and hospital bills. On December 27, 1929, the insurance carrier requested permission to stop

<sup>30</sup> For instance pain and suffering are not allowed to be figured as items of compensation. *Watson v. Cannon Mills Co.*, 1 N. C. I. C. 58 (1929).

<sup>31</sup> *Hercules Powder Co. v. Morris County Court*, 93 N. J. L. 93, 107 Atl. 433 (1919); *Kostida v. Dep't. of Labor and Industries*, 139 Wash. 629, 247 Pac. 1014 (1926) (loss of testicle held compensable under the clause of the local statute, "or any other injury known in surgery to be permanent partial disability.")

<sup>32</sup> *A Survey of Statutory Changes in N. C.* (1929) 7 N. C. L. Rev. 363, 409 n. 18.

<sup>33</sup> *Wood v. Central Carolina Fair Asso.*, 1 N. C. I. C. 235 (1930).

<sup>34</sup> *Pfaff v. Forsyth County*, 1 N. C. I. C. 270 (1930). But *quære* is the deputy sheriff the employee of the county or of the sheriff.



further payments. Permission was granted. At the hearing the deputy sheriff claimed that he did not receive the money from the ambushers until December. It was determined that the full amount the deputy would have been entitled to under the Act was \$2,103.55. In upholding the privilege to cease further payments the Commission stated that it must be assumed, although the judgment of the criminal court does not recite the purpose for which the \$2,000 was paid, that "it was in full satisfaction of the rights and remedies the plaintiff (the deputy sheriff) had against his assailants—certainly not for the failure to prosecute the felony charge against them." Then it is further stated: "This Commissioner has no authority to direct or order that the plaintiff reimburse the defendants (insurance carrier) this overpayment of \$837.20; and as to the defendants being estopped by the judgment of the July term, 1929, in Criminal Court, from proceeding against the third parties for its collection, presents a question for another tribunal."

Section 11 might be construed to deny compensation to an employee who had received a settlement from the third party who caused the injury, but to deny to the third person, who paid for the supposed discharge, the power to set this fact up by way of defense to the claims of the employer who, in ignorance of the settlement, paid compensation. This is not quite a paradox. The employee should not be allowed a double recovery. The employer paying compensation should not be denied his remedy against the third person who made the settlement. To allow the settlement with employees (often secured through the improvidence and ignorance of the injured employee) to exonerate the third party-tort-feasor would deny to the employer paying compensation the full protection contemplated by the act in such a situation, for settlements are not always as much as compensation would be. It would seem that when a third party takes a release or settles a claim, he should secure the approval of the person or corporation liable for compensation, and that failure to do so should destroy the effect of the release as a defense to a claim by an employer who had paid compensation for the same injury.<sup>35</sup>

<sup>35</sup> The effect of the employee receiving payments from or settling with third persons is usually determined by the particular provisions of the local compensation act. The general view, however, is that the employer is not deprived of his right of action for damages against the third party. Note (1922) 19 A. L. R. 766, 788.

### Dependency

By §39 a conclusive presumption of dependency is raised in the cases of a widow, a widower, and/or a child.<sup>36</sup> The presumption is that they are wholly dependent. The existence of one wholly dependent excludes from compensation any of the partial dependents. Determination of the extent of the dependency of partial dependents has proven troublesome. It is stated in §39: "In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident."<sup>37</sup> The case of *Griffin v. McLellan Stores*<sup>38</sup> shows the difficulty of applying this quoted section. *A* was stabbed to death by a shop lifter. *A* turned over to his mother each week his weekly salary of \$19. She gave him \$4 each week for spending money and purchased his clothes out of the family fund. *A* paid no board. The mother, the responsible head of the family, with this aid from her son, and by taking in roomers, supported the family including a husband and two or three minor children. The holding of the Commission that a claim of dependency, for the purpose of compensation, is not defeated by a showing that the claimant could support himself by his own unaided efforts, seems to be correct.<sup>39</sup> But the holding that the mother was a partial dependent to

<sup>36</sup> The term child includes an illegitimate child who is an acknowledged dependent. *Peak v. City of Salisbury*, 1 N. C. I. C. 142 (1929). Section 2 (L) also includes within the term child a posthumous child, a child legally adopted prior to the accident and a stepchild. But it excludes married children unless wholly dependent. By §2(n) the term widow includes only the decedent's wife and by interpretation this has been held to exclude a claimant purporting to be a common law wife by a union in this state. *Reeves v. Parker-Graham Sexton Inc.*, 1 N. C. I. C. 277 (1930). To warrant payment to a surviving spouse it must be shown that the applicant was married to the deceased before the date of the injury and that the marriage was such as the *lex loci* recognized. To permit any other procedure would be to open the door "to false pretenses of marriage and would invite and encourage impostors to contest the claims of helpless dependents."

<sup>37</sup> The Commission has taken occasion to discourage the claims of administrators appointed subsequent to an award to dependents. An award prior to the appointment of an administrator is not *res judicata* as to him, but when there has been an award to persons found to be dependent, the administrator cannot recover. Therefore, such claims of the personal representatives merely burden the Commission with extra business and hearings. *Smith v. Carolina Power & Light Co.*, 1 N. C. I. C. 172 (1929).

<sup>38</sup> 1 N. C. I. C. 144 (1929).

<sup>39</sup> Dependency does not mean distress nor does it mean a reduction of expenses below a reasonable standard of living. *Lumbermen's Reciprocal Asso. v.*

the entire extent of the wages of her son seems to override the facts of the case. The Commission recognized the logic of defendant's claims but said "our law does not purport to provide a method to determine the actual loss sustained by such a parent" and "there is no provision in the North Carolina Act for any such deduction and no language from which such requirement can be inferred." A liberal construction of the quoted section would have led to a recognition that at least the spending money allowance should be considered as an item which the son did not contribute to the family treasury. It should be considered not as a reduction but rather an item not contributed.

### *Recovery by Personal Representative When No Dependents*

The last sentence in §29 reads: "In case of death the total sum paid shall be six thousand dollars less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased." The other portion of this section provides for compensation for total disability at the 60% rate, with the \$7 and \$18 weekly limits, for not more than 400 weeks and for not over \$6,000. The quoted sentence was considered by Commissioner Dorsett in *Smith, administratrix v. Carolina Power and Light Co.*,<sup>40</sup> and was held to be ambiguous, not specific, inoperative and void. Construed alone with the prior provisions of §29 it is either meaningless or a life insurance in the sum of \$6,000. The latter construction is obviously at variance with the purpose of the whole act. Moreover, it is at variance with and conflicts with §38, which deals with survivors wholly and partially dependent, and with §40 which deals with the amount payable to the personal representative when no dependents exist. On an appeal to the full Commission the holding was affirmed. And in a still later case Commissioner Wilson speaks of §29:

Warner, 245 S. W. 664 (Tex. Civ. App. 1922); Pushor v. American Ry. Ex. Co., 149 Minn. 308, 183 N. W. 839 (1921); Dazy v. Apponaugh Co., 36 R. I. 81, 89 Atl. 160 (1914); Appeal of Hotel Bonding Co., 89 Conn. 143, 93 Atl. 245 (1915).

For a general collection of cases on the subject of whole and partial dependency see, Note (1921) 13 A. L. R. 686; Note (1924) 30 A. L. R. 1253; Note (1925) 35 A. L. R. 1066; Note (1928) 53 A. L. R. 218; Note (1929) 62 A. L. R. 160.

<sup>40</sup> 1 N. C. I. C. 117 (1929). This ruling of the Commission was affirmed by the Supreme Court of North Carolina. *Smith v. Carolina Power & Light Co.*, 198 N. C. 614, 152 S. E.—(1930) (the first reported decision of the Supreme Court on the Compensation Act).

"But said amender left the realm of compensation, which in principle provides for those who are dependent and says that six thousand dollars shall be paid to the personal representative, which means that the money would be distributed according to law, and not according to dependency. Dependents would share equally with others of equal kin."<sup>41</sup>

The direct question of whether a personal representative could recover under the Act when there were no dependents arose later. *A*, an employee, left surviving him his father, stepmother, two brothers, one sister, three half brothers and one half sister, none of whom were either wholly or partially dependent on the intestate. *A*'s weekly wage was \$22. The award allowed "the commuted amount of \$13.20 compensation for three hundred and fifty weeks, less the burial expenses."<sup>42</sup> In arriving at this conclusion Commissioner Wilson had to sustain §40, which provides: "If the deceased employee leaves no dependents the employer shall pay the personal representative of the deceased the commuted amount provided for in §38 of this act, less the burial expenses which shall be deducted therefrom." One reason for declaring this section valid was thus stated by the Commissioner: "It was placed there to help eliminate an evil that has grown up as a result of compensation laws, to wit: discrimination against employees with large families and dependents."<sup>43</sup> The legislative debates are cited to support this view and to indicate the legislative intent. The legislative intent and the words of §40 "make it difficult to place the proper construction." In §40 there is a reference to the commuted amount provided by §38. But §38 has no reference to commuted amount except as it refers to aliens. Since §44 stipulates how any and all future compensation may be commuted, the Commissioner decided that compensation payable under §38 can be commuted in accordance with §44. In determining the amount payable the Commissioner saw that §38 provided rules for figuring compensation for (1) those wholly dependent, (2) partial dependents and (3) aliens. The third rule was discarded. The first rule was adopted because under the second rule it "would never know how to figure same, because it is not based upon known facts." A defect in this method was apparent to the Commissioner.

<sup>41</sup> *Freeman v. B. & N. Motor Co.*, 1 N. C. I. C. 283, 285 (1930).

<sup>42</sup> *Supra* note 41.

<sup>43</sup> In making this statement the Commissioner prefaced his remarks by stating that the "original section 40 provided funeral benefits for a deceased employee who left no dependents, and \$500.00 payable to the Commission to be used for rehabilitation purposes."

"We realize full well that with this interpretation another evil will be set up that will to a degree, offset the remedy. That is, where there is partial dependency of limited proportions, a temptation will be created to deny such partial dependency for the greater recovery. Often this will probably mean less for the actual partial dependent or dependents."<sup>44</sup>

On an appeal from the opinion of the single Commissioner his opinion and award were adopted as the "Award and Opinion of the Full Commission."<sup>45</sup> In arriving at this conclusion it was observed, to the objection that the legislature had not fixed a rule in determining the commuted amount, that under §54 of the Act the Commission had been delegated the power to make rules consistent with the Act and that in pursuance thereof it had fixed the rate of discount to be used in arriving at lump sum settlements. As a final reason for affirmance it is stated:

"As we see it, §40 is not inconsistent with or repugnant to §38, and if the legislature has expressed its intention in the law itself with certainty, the Commission has no right to depart from that intention or any extraneous consideration or theory of construction."<sup>46</sup>

Commissioner Dorsett dissented from the opinion of the Commission.<sup>47</sup> His first contention was that since §11 attempts to make the right under §40 exclusive as to all rights of the employee and others, including his personal representatives, at common law or otherwise, and since §77 repeals all prior acts and parts of acts inconsistent therewith, it might seem to repeal the statutory remedy provided for wrongful death.<sup>48</sup> But since it does not do so specifically, it would require an act clear and unambiguous in terms and covering the whole matter of the antecedent act.<sup>49</sup> Commissioner Dorsett points out that the "Act as a whole is for the purpose of compensating injured employees or their dependents for injuries or death attributable to industrial accidents."<sup>50</sup> He then attempts to show that §40 is vague, indefinite and ambiguous, and therefore, void, citing the same section used by the majority opinion in construing §40. He further points

<sup>44</sup> *Supra* note 41 at 287.

<sup>45</sup> *Freeman v. B. & N. Motor Co.*, 1 N. C. I. C. 324 (1930).

<sup>46</sup> *Supra* note 45 at 327.

<sup>47</sup> This is the first reported dissent.

<sup>48</sup> N. C. Cons. Stat. Ann. (1919) §160.

<sup>49</sup> *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417 (1896).

<sup>50</sup> This is emphasized by the statement that under no other state acts is there a provision similar to the one in the North Carolina Act.

out that the commuted amount does not mean compensation, that the majority rule will have trouble with §36,<sup>51</sup> that if the insurance rates are high the present view will necessitate the higher rates, and that he does not anticipate the discrimination against employees with dependents. The dissenting view contends that under the majority interpretation the payment would not be compensation, that §21 exempting compensation from the claims of the creditors would not apply, that the payments would be open to claims of creditors of the deceased, and that the result would be contrary to the wrongful death statute which exempts the recovery from creditors' claims and that the result would make the industries the virtual insurers of the debts of their employees.<sup>52</sup>

While the views of the dissenting opinion are unanswerable on the subject of the advisability of deleting §40 by legislative repeal, the majority view appears to be correct in holding that the Industrial Commission should make every effort to carry into effect the terms of the Act. Although the majority opinion had to effectuate §40 by devious references to other sections, this process is not in itself objectionable. That §40 is the product of hurried legislation (perhaps unavoidable) seems obvious. The Industrial Commission seems to have chosen a wise plan in making the best of a bad situation rather than in attempting to avoid it by declaring the section void and inoperative.<sup>53</sup>

### *Appeal*

On the question of appeal from the Commission's award §60 provides: "The award of the Commission . . . if not reviewed in due time, or an award of the Commission upon review shall be conclusive and binding as to all questions of fact, but either party . . . may within

<sup>51</sup> §36 provides for payment of compensation to the *dependents only* of a deceased employee, when the death occurred outside of the state.

<sup>52</sup> This argument of the dissent seems to be directed to the point that the allowance of a commuted amount is not in accord with the spirit of the Act. The argument would certainly not be very creditable if it meant to suggest that the windfall to the non-dependent next of kin should be exempt from the claims of creditors of the deceased. If the personal representative of a deceased employee is allowed a recovery under the Act, social desirability demands that such a sum be subject to the claims of creditors.

<sup>53</sup> In *Smith v. Carolina Power & Light Co.*, 198 N. C. 614, 621, 152 S. E.—(1930), there is a dictum which tends to indicate that the Supreme Court would uphold §40: "Sections 38 and 40, in clear and comprehensive detail, provide a legal method of determining compensation for fatal injuries. The last clause of section 29 is totally repugnant to the definite method of settlement prescribed in sections 38 and 40."

thirty days . . . appeal . . . to the Superior Court . . . for errors of law under the same terms and conditions as govern appeal in ordinary civil actions." The Act does not specify the particular steps in the appeal. Since the Commission's findings of fact are conclusive, there would seem to be no necessity to send up on appeal to the Superior Court any part of the usually lengthy record. Apparently, it would be sufficient to send up the decision of the Commission, which includes a statement of the facts of the case, the conclusions of law and the award. There would seem to be no necessity for the Superior Court Judge to examine the record since the findings of fact by the Commission are conclusive. The question presented by the consideration of whether or not the Commission's findings of fact would be conclusive and binding in case there was no evidence to support them stands at the threshold of a consideration of appeal. If the words of the statute did not include such a situation, then there would be instances in which it would be necessary to bring up the record on appeal. But the section quoted above seems to be broad enough to cover this possibility and to deny the appellate courts this power of review.

Would it be necessary in an appeal from the Superior Court to the Supreme Court to include in the statement of case on appeal more than the opinion of the Commission, the judgment of the Superior Court on the questions of law, and the assignment of errors as to the rulings of law? The usual statement of case on appeal from a trial court includes: (1) a short statement of the facts of the case and the trial history; (2) the evidence, or pertinent parts thereof, with the exception indicated; (3) the request for instruction with the exception to the granting or refusal indicated; (4) the charge of the judge as signed by him if there be an exception thereto; (5) assignments of error alleged.<sup>54</sup> It is obvious that (3) and (4) will never be a part of the record for the questions of fact are determined by the Commission. Since the facts are so determined and since the proceedings before the Commission are simple, summary and devoid of technicalities,<sup>55</sup> it would seem that (2) should find no place in the

<sup>54</sup> N. C. Cons. Stat. Ann. (1919) §643; McINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1929) 788.

<sup>55</sup> Queen v. Clyde Mills Inc., 1 N. C. I. C. 1 (1929) (motion for non-suit a useless procedure); Bulletin North Carolina Industrial Commission, Vol. I, No. 1, at 11.

record proper on appeal.<sup>56</sup> As for (1) the opinion of the Commission is conclusive on the facts and is usually brief and concise, and certainly there is no place to set forth complaint and answer, etc., since there are none. Therefore, upon appeal to the Supreme Court it would be necessary to include in the record only the opinion of the Commission, the judgment of the Superior Court, and the assignment of errors as to the questions of law. Such a practice would be in accord with that portion of Rule 19 of the Rules of Practice in the Supreme Court which specifies: "It shall not be necessary to send as a part of the transcript, affidavits, orders and other process and proceeding in the action not involved in the appeal and not necessary to an understanding of the exception relied on."<sup>57</sup>

In another sentence of §60 it is stated: "The Commission, of its own motion, may certify questions of law to the Supreme Court for decision and determination by said court." It is doubtful if this may be done. The sentence does not increase the authority of the court to render advisory opinions to coördinate branches of the government.<sup>58</sup> Nor does it set up a procedure for declaratory judgments.<sup>59</sup> It seems rather to be an attempt to create a new method of securing advice from the appellate tribunal for the use of an inferior tribunal. As such it resembles neither the equitable jurisdiction of the court to quiet title<sup>60</sup> and to instruct executors and trustees,<sup>61</sup> nor the statutory jurisdiction to settle and register the title of real estate under the Torrens Act.<sup>62</sup> These actions arise out of the instigation of parties.<sup>63</sup>

<sup>56</sup> But where the Commission has made statements in their conclusions of law concerning burdens of proof and other rules of evidence, there might be an assignment of error on the question of law. For examples of mention of rules of evidence see, *Helms v. Meyers Mills Inc.*, 1 N. C. I. C. 9, 11 (1929); *Holtzclaw v. Carolina Mining Co.*, 1 N. C. I. C. 30, 34 (1929); *Logan v. Elliott Building Co.*, 1 N. C. I. C. 90, 92 (1929); *Williams v. Kitchen Lumber Co.*, 1 N. C. I. C. 209, 210 (1930).

<sup>57</sup> 192 N. C. 847 (1926).

<sup>58</sup> In the Matter of Advisory Opinions, 196 N. C. Appendix (1929); Note (1929) 7 N. C. L. Rev. 449.

<sup>59</sup> Stated briefly the Uniform Declaratory Judgments Act is as follows: "Courts of record within their respective jurisdictions shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either negative in form and effect, and such declaration shall have the force and effect of a final decree or judgment." *McINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES* (1929) 732.

<sup>60</sup> *McINTOSH, op. cit.*, *supra* note 57, at §24.

<sup>61</sup> *London v. Pelchenan*, 198 N. C. 225, 151 S. E. 189 (1930).

<sup>62</sup> N. C. Code (Michie 1927) §2377.

<sup>63</sup> As such they are semi-declaratory judgments.



Moreover, the court has declared there must be a real controversy and not a pro forma judgment to feel the way in doubtful litigation,<sup>64</sup> that neither a feigned issue<sup>65</sup> nor a moot question<sup>66</sup> will be considered. On a few occasions, however, the court has accomplished by indirection what they declined to do directly, i.e., by saying that if the question was before us we would hold, etc.<sup>67</sup> To apply the canonized axiom of Anglo-Saxon jurisprudence that the courts are created to redress private wrongs would be to declare the quoted portion of §60 inoperative. To use the method of indirection would be a half-hearted and variable declaration of its usefulness. To allow it full force and effect would be a forward step in procedure.<sup>68</sup>

### Contempt

In a recent case before a Commissioner, a doctor was sentenced to ten days in jail for contempt when he refused, after testifying on the facts in the case, to state his opinion on the connection between the injury and the subsequent paralysis unless he was assured an expert witness fee. This raises the interesting question of whether or not the Industrial Commission is a court, for a consideration of the power to punish for contempt must first be predicated on a finding that there is a court.<sup>69</sup>

<sup>64</sup>*Supra* note 58; *Kistler v. Southern Ry. Co.*, 170 N. C. 666, 79 S. E. 676 (1915).

<sup>65</sup>*Parker v. Raleigh Savings Bank*, 152 N. C. 253, 67 S. E. 492 (1910).

<sup>66</sup>*Supra* note 58.

<sup>67</sup>*Burton v. Durham Realty & Ins. Co.*, 188 N. C. 473, 474, 125 S. E. 3 (1924); *Reid v. Alexander*, 170 N. C. 303, 87 S. E. 125 (1915); *Farthing v. Carrington*, 116 N. C. 315, 322, 22 S. E. 9 (1895).

<sup>68</sup>Perhaps the procedure might be allowable upon an analogy to the procedure in the Federal Circuit Courts of Appeal of certifying to the Supreme Court "any questions or propositions of law concerning which instructions are desired for the proper decision of the cause." 28 U. S. C. A. §346 and notes.

<sup>69</sup>*News and Observer* (Raleigh, April 9, 1930) at page 1.

The weight of authority is to the effect that an expert witness is not entitled to demand expert witness fees before testifying to facts within his knowledge, although it may have required professional study, learning and skill to ascertain them. Note (1919) 2 A. L. R. 1576; (1930) 39 YALE L. J. 761. For the common law view. 4 WIGMORE, EVIDENCE (2nd ed. 1923) §2203. Originally in North Carolina the court could not fix an allowance for expert witnesses, but by statutory enactment it may now do so. *Chadwick v. Life Ins. Co. of Va.*, 185 N. C. 380, 383, 74 S. E. 115 (1912); N. C. Cons. Stat. Ann. (1919) §3893. And where the witness is a witness to facts observed by him, the court may in the exercise of its discretion refuse an allowance of expert fees, although the witness is called upon to express an opinion based upon his observation of the facts in the particular case.

As a sidelight it is well to note that under §27 of the Compensation Act any physician appearing before the Industrial Commission is deprived of his qualified privilege concerning the communications of his patient, the injured employee.

The Industrial Commission is given some of the powers incident to a judicial body. If the employee and the employer fail to reach an agreement as to compensation, a hearing before a Commissioner is held.<sup>70</sup> This is open to the public and stenographically reported.<sup>71</sup> The Commissioner hears the parties, their representatives and witnesses and determines the dispute in a summary manner.<sup>72</sup> "The award, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue shall be filed with the record of the proceeding, and a copy of the award shall immediately be sent to the parties in dispute."<sup>73</sup> Application may be made for a review before the full Commission of a Commissioner's award and the full Commission may rehear the evidence, hear new evidence, and amend or affirm the award.<sup>74</sup> An appeal may be taken from the award of the Commission, or of the Commissioner, to the Superior Court, and in such an appeal the fact findings of the Commission are conclusive and binding.<sup>75</sup> A certified copy of the award of the Commission may be filed in the Superior Court and a judgment shall be entered in accordance therewith.<sup>76</sup> The Commission may assess the costs of the whole proceedings upon the party who "brought, prosecuted or defended without reasonable grounds."<sup>77</sup> Moreover, in the hearing of disputed claims the Commission functions as a court. Attorneys appear, present evidence, interrogate witnesses and argue questions of law.

On the other hand the Industrial Commission performs numerous functions as an administrative body. It has certain legislative attributes.<sup>78</sup> It is not expressly made a court of record as is the Cor-

<sup>70</sup> §57.

<sup>71</sup> §53(d).

<sup>72</sup> §58.

<sup>73</sup> §58.

<sup>74</sup> §59.

<sup>75</sup> §60.

<sup>76</sup> §61. This section has a provision that a certificate from the Commission filed by the judgment debtor showing that he has insured his liability (under §67) shall be entered by the Clerk of the Superior Court upon the judgment book and shall operate as a discharge of the lien, but if there is default in payment of any installment of an award the court (presumably the Clerk of the Superior Court) may, "upon application for cause and ten days notice to the judgment debtor, order the lien restored."

By §20 the rights of compensation have preference or priority against the assets of the employer "as is allowed by law for any unpaid wages for labor." The question arises whether §20 operates whenever by §61 there is a discharge and a subsequent restoration of the lien.

<sup>77</sup> §62.

<sup>78</sup> §54(a), to make rules, "not inconsistent with this act, for carrying out the provisions of this act."

poration Commission.<sup>79</sup> Nor is the Industrial Commission expressly given the power to punish for contempt, whereas such power is vested in the Corporation Commission.<sup>80</sup> Moreover, in most states such a commission as the Industrial Commission is considered as an administrative body,<sup>81</sup> although such bodies usually have the incidents of power mentioned in the above paragraph.

If the Industrial Commission is a court, the corollary that it has the power to punish for contempt does not automatically follow. The Supreme Court, the Superior Courts and the Justice of the Peace Courts are constitutional courts.<sup>82</sup> As such they cannot be limited by statute in the exercise of their power to punish for contempt.<sup>83</sup> But the Industrial Commission, if a court at all, is one of the inferior courts which, by the Constitution, the legislature is given the power to create. Since the legislature can create and abolish inferior courts, it has the power to limit such a court in the matter of jurisdiction and authority. Therefore, it is conceivable that the legislature might create an inferior court and specify that it should not have the power to punish for contempt. But a failure to provide such an express power to punish for contempt does not mean that such a power does not exist in the court. It would seem rather to indicate that it did have such a power.<sup>84</sup> It is a necessary inference that every court unless expressly deprived of the power, has the inherent right to punish for contempt.<sup>85</sup> Otherwise, a court would

<sup>79</sup> N. C. Cons. Stat. Ann. (1919) §1023. The Corporation Commission has been called an "administrative court." Nichols, *Judicial Review of the North Carolina Corporation Commission* (1924) 2 N. C. L. Rev. 69, 73.

<sup>80</sup> N. C. Cons. Stat. Ann. (1919) §§983, 1090.

<sup>81</sup> There are conflicting views on the question of whether or not Workmen's Compensation bodies are courts. In the majority of jurisdictions these bodies are deemed to be only administrative in character. *Devine's Case*, 236 Mass. 588, 129 N. E. 414 (1921); *Brunette v. Brunette*, 171 Wis. 366, 177 N. W. 593 (1920). In some jurisdictions, however, they are recognized as judicial tribunals. *Cook v. Massey*, 38 Idaho 264, 220 Pac. 1088, 35 A. L. R. 200 (1923); *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916).

<sup>82</sup> N. C. Constitution, Art. IV, §12.

<sup>83</sup> N. C. Constitution, Art. IV, §12; *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957 (1905). It is admitted, however, that the statutory enactment relative to contempt has deprived the constitutional courts of none of their inherent rights on this subject.

<sup>84</sup> By N. C. Cons. Stat. Ann. (1919) §983, *every inferior court* is given the power "to punish for contempt while sitting for the trial of causes or engaged in official business."

<sup>85</sup> *State v. Aiken*, 113 N. C. 651, 652, 18 S. E. 690 (1893). And in *In re Deaton*, 105 N. C. 59, 65, 11 S. E. 244 (1890), there is the following statement: "It was contended below that a Mayor has no jurisdiction to punish for contempt, because not named among the officers having that power in the Code,

become a nullity, shackled by its impotence to preserve a semblance of dignity.

The failure of the Act to designate the Industrial Commission a court does not seem to indicate a legislative intent that it should not be a court. The failure to have an express statement that the Commission should be a court is perhaps chargeable rather to inadvertence than to a purpose to deny it recognition as a judicial body. The fact that the Commission is given administrative and legislative functions does not prevent it from being a court. The fact that subsection (c) of §54 says that "the Superior Court shall, on the application of the Commission or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses" militates against the view that the Commission may punish for contempt. But it is not conclusive.<sup>86</sup> Moreover, a prior portion of §54 gives the Commission the power to "subpoena witnesses, administer or cause to be administered oaths." The power given to the Superior Court might be considered an alternative process open to the Commission, for it is not expressly made the sole process. It would seem to be in keeping with the dignity necessary to the proper discharge of the Commission's judicial duties and powers, as well as in keeping with the purpose of the Act, for the Supreme Court to decide that the Industrial Commission is an inferior court invested with the power to punish for contempt.

Sec. 651 [now N. C. Cons. Stat. Ann. (1919) §983]. Apart from the fact that every court inherently possesses such power independent of statutory enactment, the Code, Sec. 3818 [now N. C. Cons. Stat. Ann. (1919) §2634] constitutes the Mayor an Inferior Court, and gives him the powers of Justice of the Peace."

<sup>86</sup> It might be said that by this section the Industrial Commission is given the further power to ask the Superior Court to punish for contempt before the Commission. This would be an alternate procedure and would not divest the Commission of its power to punish. For a somewhat analagous situation in the case of a referee or a commissioner, see *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893), and *LaFontine v. Southern Underwriters Ass'n*, 83 N. C. 133 (1880).